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No. 237

IN THE

Supreme Court of the United States

October Term, 1960

ATLANTA NEWSPAPERS, INC., GEORGIA PRESS ASSOCIATION, and MARION JOHNSON,

Appellants,

—v.—

T. RALPH GRIMES, as Sheriff of Fulton County, Georgia, and THE STATE OF GEORGIA, by Paul Webb, Solicitor General of the Atlanta Judicial Circuit,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT

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ATLANTA NEWSPAPERS, INC., GEORGIA PRESS ASSOCIATION, and MARION JOHNSON,

Appellants,

—v.—

T. RALPH GRIMES, as Sheriff of Fulton County, Georgia, and THE STATE OF GEORGIA, by Paul Webb, Solicitor General of the Atlanta Judicial Circuit,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT

This appeal is from a final judgment of the Supreme Court of Georgia declaring valid a rule—having the force and effect of statute, and being issued in reliance on Georgia statutory authority—promulgated by Judge Durwood T. Pye, one of the judges of the Superior Court of Fulton County, Georgia, which rule provides that "No photograph of any party to any trial, or of any defendant, prosecutor, attorney, witness, juror, spectator, or other participant in or at any trial, shall be taken at any place in the courthouse building, on the courthouse steps, or on the adjacent sidewalks and public streets", and that no recording may be made of anything "done or said by any such person at any such place", and that the rule shall be effective until the trial "shall have been completed and all persons in attendance thereon shall have retired from the courthouse and

adjacent sidewalks and public streets, and thereafter shall have dispersed."

Appellants submit that such rule, and the ostensible statutory authority for it, are unconstitutional as a "previous restraint" on freedom of the press and freedom of speech, and as a violation of due process, equal protection of the laws and the privileges and immunities of citizens of the United States, as well as the right of the public to "public" trials in criminal cases.

Opinions Below

The opinion of the Supreme Court of Georgia, entered May 5, 1960, affirmed on motion for rehearing May 18, 1960, is reported at Ga. , 114 S. E. 2d 421; a copy of such opinion being attached hereto as Appendix A. The opinion of the trial court, entered April 14, 1959, which was affirmed by the decision appealed from, is not reported; copy of such opinion being attached hereto as Appendix B.

Jurisdiction

This action was brought for declaratory judgment in the Superior Court of Fulton County, Georgia, on November 19, 1958, by Atlanta Newspapers, Inc., a corporation engaged in publishing The Atlanta Journal and The Atlanta Constitution, Marion Johnson, a photographer employed by Atlanta Newspapers, Inc., and Georgia Press Association, a corporation organized to promote, protect and advance the interests of its members consisting of about 200 newspaper publishers, such Association being also publisher of a monthly magazine. Defendants were T. Ralph Grimes, as Sheriff of Fulton County, and the State of Georgia by Paul Webb, Solicitor General of the Atlanta Judicial Circuit. The action was brought under the Georgia Declaratory Judgments Act, Acts of 1945, Georgia Code Annotated Supplement Sections 110-1101 through 110-1111.

Plaintiffs (Appellants herein) sought a declaration that the rule issued by Judge Durwood T. Pye (quoted partially above and in full in the next section of this Jurisdictional Statement) is invalid as denying freedom of speech and the press, due process of law, equal protection of the laws, and the privileges and immunities of citizens of the United States, all in violation of the First and Fourteenth Amendments to the Constitution of the United States as well as applicable provisions of the Georgia Constitution. The trial court (Judge Pye) treated the action as one to modify, vacate or set aside a rule prescribed by the court for the conduct of the business before it, and concluded in a 123-page opinion (attached hereto as Appendix B) that the rule "is lawful, desirable and proper in every respect, and is continued in force."

On appeal, the Supreme Court of Georgia affirmed in a judgment entered May 5, 1960 (attached hereto as Appendix A), and Appellants' motion for rehearing was denied by an order entered May 18, 1960. Notice of Appeal to this Court was filed in the Supreme Court of Georgia on July 12, 1960.

The statutory provision which is believed to confer on this Court jurisdiction of the appeal is 28 U. S. C. Section 1257, 62 Stat. 929, and particularly paragraph (2) thereof. Alternatively, appellants rely on paragraph (3) of said statute and 28 U. S. C. Section 2103, 62 Stat. 962. Cases believed to sustain the jurisdiction of this Court on appeal are: *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Mackay Tel., etc., Co.* v. *Little Rock*, 250 U. S. 94 (1919); *Lake Erie, etc., R.R.* v. *Public Utilities Comm'n.*, 249 U. S. 422 (1919); *Reinman* v. *Little Rock*, 237 U. S. 171 (1915); *Williams* v. *Bruffy*, 96 U. S. 176, 183 (1878). Alternative jurisdiction of this Court as on petition for writ of certiorari is sustained by: *Commonwealth* v. *Board of Directors of City Trusts*, 353 U. S. 230 (1957); *Anonymous Nos. 6 and 7* v. *Baker*, 360 U. S. 287 (1959).

Statutes Involved

This appeal involves the validity of a rule—having the force and effect of a statute (Georgia Code Section 24-106 quoted below; and see R. 223—App. B, p. 109a—where Judge Pye held that the rule has "the force of statute"), and issued in reliance on Georgia statutory authority—promulgated by Judge Durwood T. Pye of the Superior Court of Fulton County, Georgia on November 3, 1958 (said rule appearing in Criminal Minutes 42 page 442 of that Court) as follows:

"IN THE
SUPERIOR COURT OF FULTON COUNTY, GEORGIA

"Notice will be taken of the following provisions in respect of all proceedings in this Division, and the Sheriff will enforce them, to-wit:

"*1st.* The following, which is Rule 27 adopted April 20, 1951, by the Judges of this Court, to-wit:

"'BARRING OF PHOTOGRAPHS No pictures or photographs shall be taken in the court rooms, witness rooms, jury rooms, entrances to the court rooms and passageways to and from the witness rooms and jury rooms. This rule shall apply at all times whether or not the Court shall be in session or recess.'

"*2nd.* Additionally, the following, to-wit:

"Equipment for taking photographs, sound recording devices, television equipment, moving-picture devices, sound-scribers, tape recorders, wire recorders and other recording devices shall not be brought into the court rooms, witness rooms, jury rooms, entrances to the court rooms, and passageways to and from jury rooms and witness rooms. This shall apply at all times whether or not the Court shall be in session or recess.

"*3rd.* Additionally, the following, to-wit:

"No photograph of any party to any trial, or of any defendant, prosecutor, attorney, witness, juror, spectator, or other participant in or at any trial, shall be taken at any place in the courthouse building, on the courthouse steps, or on the adjacent sidewalks and public streets. Nothing done or said by any such person at any such place shall be recorded by any television instrument, moving-picture camera or other instrument, sound-scriber, tape recorder, wire recorder, or any other recording device or equipment. This Rule 3rd shall apply at all times during trials, and in respect of a particular trial, until it shall have been completed and all persons in attendance thereon shall have retired from the courthouse and adjacent sidewalks and public streets, and thereafter shall have dispersed.

"*4th.* Additionally, the following, to-wit:

"No photographs will be taken of the jury or of any juror or of any officer in attendance on the jury or a juror at any time or place. Nothing said at any place by any juror or any officer in attendance on a juror or the jury shall be recorded by any of the devices aforestated or otherwise recorded.

"*5th.* Each of these provisions will be liberally construed in the interest of orderly proceedings and impartial trials; and shall in nowise prevent the press or public from taking shorthand or longhand accounts of all proceedings, but, if necessary, the number of persons so engaged will be regulated.

"This 3rd day of November, 1959.

s/ Durwood T. Pye
Judge, Superior Court,
Atlanta Judicial Circuit."

Also involved are the following provisions of Georgia statutory law on which Judge Pye relied (R. 166, 167) in issuing such rule, and on which the Supreme Court of Georgia relied in sustaining the validity of the rule:

Georgia Code Section 24-104:

"Every court has power—

"1. To preserve and enforce order in its immediate presence, and as near thereto as is necessary to prevent interruption, disturbance, or hindrance to its proceedings.

* * * * *

"4. To control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto."

Georgia Code Section 24-106:

"The rules of the respective courts, legally adopted and not in conflict with the Constitution of the United States or of this State, or the laws thereof, are binding and must be observed."

The following provisions of the Constitution of the United States are also involved:

First Amendment—

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment—

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

Where a single judge of the Superior Court of Fulton County, Georgia has issued a rule prohibiting any person from photographing, or recording an interview with, "any party to any trial or . . . any defendant, prosecutor, attorney, witness, juror, spectator, or other participant in or at any trial . . . at any place in the courthouse building, on the courthouse steps, or on the adjacent sidewalks and public streets," until such time as the trial "shall have been completed and all persons in attendance thereon shall have retired from the courthouse and adjacent sidewalks and public streets, and thereafter shall have dispersed,"

(1) Is such rule invalid as an infringement of the right of newspapers and their employees under the First and Fourteenth Amendments to the Constitution of the United States to freedom of speech and the press?

(2) Is such rule invalid under the Fourteenth Amendment as a denial of due process of law?

(3) Is such rule invalid under the Fourteenth Amendment as a denial of equal protection of the laws?

(4) Is such rule invalid under the Fourteenth Amendment as an infringement of the privileges and immunities of citizens of the United States?

(5) Is such rule invalid under the Fourteenth Amendment as a denial of the right of public trial in criminal cases?

Statement of the Case

On November 3, 1958, Judge Durwood T. Pye, one of the judges of the Superior Court of Fulton County, Georgia, promulgated a rule, paragraph 3rd (hereinafter referred to as the "rule") of which provided as follows (R. 257):

> "No photograph of any party to any trial or of any defendant, prosecutor, attorney, witness, juror, spectator, or other participant in or at any trial, shall be taken at any place in the courthouse building, on the courthouse steps, or on the adjacent sidewalks and public streets. Nothing done or said by any such person at any such place shall be recorded by any television instrument, moving-picture camera or other instrument, sound-scriber, tape recorder, wire recorder, or any other recording device or equipment. This Rule 3rd shall apply at all times during trials, and in respect of a particular trial, until it shall have been completed and all persons in attendance thereon shall have retired from the courthouse and adjacent sidewalks and public streets, and thereafter shall have dispersed."

On November 19, 1958, Appellants (Atlanta Newspapers, Inc., publisher of The Atlanta Journal and The Atlanta Constitution; Marion Johnson, a photographer employed by Atlanta Newspapers, Inc.; and Georgia Press Association, representing about 200 newspaper publishers) brought this declaratory judgment action (R. 259) seeking a judicial declaration that said rule is invalid because, as stated in the petition in addition to various State grounds,

". . . insofar as said order provides that no photograph of any party to any trial, or of any defendant, prosecutor, attorney, witness, spectator, or other participant, shall be taken at any place on the adjacent sidewalks and streets, and insofar as it provides that nothing done or said by any such person at any such place shall be recorded by any television instrument, moving-picture camera or other instrument, sound-scriber, tape recorder, wire recorder, or any other recording instrument, during a particular trial, or until it shall have been completed and all persons in attendance thereon shall have retired from the court house and adjacent sidewalks and public streets and thereafter shall have dispersed, said order is erroneous and invalid in that its enforcement denies to petitioners and other members of the public . . . the right of freedom of the press and fairly using the press, in violation of Section 1 of the First Amendment to the Constitution of the United States which provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,' and said part of said order denies to petitioners the benefits of due process of law and deprives them of liberty and property without due process of law and deprives them of equal protection of the law, in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides, among other things, that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'" (R. 265-266.)

The case came on for trial before Judge Pye (R. 301), who held that the action was properly brought as a proceeding to modify, vacate or set aside a rule prescribed by the court for the conduct of the business before it, and who held that the rule was valid (Appendix B pp. 12a-119a; R. 302-427). Judge Pye discussed at considerable length the constitutional questions raised by Appellants' petition (Appendix B pp. 31a-102a; R. 326-363; 370-376; 384-388; 393-408), and, in his conclusions of law, specifically overruled all of Appellants' contentions with respect to freedom of speech and press, due process, equal protection of the laws and privileges and immunities (Appendix B pp. 112a-119a; R. 419-426). Appellants duly excepted to all such conclusions of law and all related findings of Judge Pye (R. 226-249), and, in addition, specifically raised again in their assignments of error (R. 249) all such constitutional questions and excepted to the trial court's rulings thereon, as follows:

> "Plaintiffs further then excepted and now except to said judgment because it orders the continuance in force of said part of said rule of November 3, 1958, prohibiting the taking of pictures on the streets and sidewalks adjacent to the court house, which not only deprives plaintiffs of their right to take pictures on the streets and sidewalks and deprives them of their constitutional rights of freedom of speech and freedom of the press, but said judgment, in decreeing that said rule of November 3, 1958, was a judgment of Fulton Superior Court applying only to cases being tried in said court before His Honor, Judge Durwood T. Pye, denies the plaintiffs the equal protection of the laws, in violation of the 14th Amendment of the Constitution of the United States."

The case was appealed to the Supreme Court of Georgia (see certificates following R. 254), which transferred the case to the Georgia Court of Appeals. The latter court

divided equally (R. 1) and transmitted the case to the Supreme Court.

The Supreme Court of Georgia considered (Appendix A; R. 430-440) the constitutional questions raised by Appellants; and made specific reference to the Georgia statutory provisions purporting to authorize Judge Pye's rule (Appendix A p. 7a; R. 436); but concluded (Appendix A p. 11a; R. 440) that "We cannot hold that under these facts the trial judge has abused the discretion vested in him by law, or that the order complained of is invalid or erroneous for any reason assigned."

The "facts" to which the Supreme Court of Georgia apparently referred were: (1) facts concerning incidents on October 16 and 17, 1958—over two weeks before the rule was issued—when five accused men were photographed outside the courthouse and their counsel addressed a crowd of people (including newspaper, television and radio representatives who had been invited by counsel for the accused—R. 67-69) from the courthouse steps; (2) the fact that the Grand Jury was investigating charges "against various public officials and employees of the State of Georgia wherein they were accused of misappropriating public funds and other offenses, which were also given wide publicity, including an indictment against the then Revenue Commissioner of the State, wherein he was charged with misappropriation of public funds, which cases were assigned for trial during the November Term, 1958, of that Division of Fulton Superior Court over which the judge who entered the order was to preside" (Appendix A p. 10a; R. 439); and (3) certain physical facts concerning the location of the courthouse and the location of the courtrooms on the second through the sixth floors.

From the foregoing it is clear that both Judge Pye and the Supreme Court of Georgia held that the rule here in question is valid, that it is authorized by Georgia statutes conferring authority on the courts to issue rules, and that

the First and Fourteenth Amendments to the United States Constitution do not preclude such rule. It is also clear that Appellants challenged the validity of such rule on these constitutional grounds in their original petition, in their exceptions and assignments of error, and in their appeal and argument before the Supreme Court of Georgia, contending that the Georgia statutes could not and did not confer on Judge Pye the authority claimed inasmuch as the rule would and did violate Appellants' rights under the First and Fourteenth Amendments to the Constitution of the United States.

The Questions Are Substantial

1. *Freedom of the Press Is Violated by Restricting the Gathering of News at the Source.*

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." The First Amendment is fully applicable to the states by reason of the Fourteenth Amendment which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Gitlow* v. *New York*, 268 U. S. 652 (1925); *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Schneider* v. *New Jersey*, 308 U. S. 147 (1939); and *Bridges* v. *California*, 314 U. S. 252 (1941).

The trial court apparently took the position that the First Amendment protects only expression, publication, and distribution of ideas and news and that there is no constitutional right of a newspaper to gather news at its source.

Thus, the trial court said (Appendix B p. 116a; R. 424):

> "The practices claimed by plaintiffs are no part of the liberties of speech and of the press . . ."

The Georgia Supreme Court repudiated that extreme position saying (Appendix A p. 6a; R. 435):

> "We also recognize that freedom of the press means freedom to gather news, write, publish, and circulate it, and that gathering news embraces photographing the news, printing of the photographs, and reproduction of the photographs in the finished newspapers . . ."

Of course, we do not contend (as intimated by the trial court, Appendix B p. 62a; R. 361) that newspapers have a constitutional right, which other individuals or enterprises do not have, to invade private homes, rifle private desk drawers, read private correspondence, or compel individuals to talk when they wish to remain silent. Also, we do not here have occasion to discuss the propriety or desirability of news photography in the courtroom or immediately outside thereof or anywhere in the courthouse. Such issues are not presented here. We here simply say that, in a *public* place—specifically the streets, sidewalks and entrances *outside* the courthouse—newspapers (and the general public, for that matter) have the constitutional right to take pictures of and interview individuals who are public figures and who have no objection to such pictures and interviews. Conceding that in highly unusual circumstances some restrictions on *mass meetings* in such places may be necessary and constitutionally permissible, we submit that it is inconceivable that any judge can enforce as a *general* rule a prohibition against *any* pictures or interviews *by* anyone *of* anyone in a *public* place *outside* the courthouse, and regardless of the circumstances at the time, simply because the person being photographed or interviewed participated in or even merely *attended* a trial in the courthouse over

which that judge presided. Yet that is the extremely broad nature of the court's order complained of in this appeal.

We shall show later herein that there is no precedent for a sweeping interdiction of photography and of news gathering. We shall further show that such an interdiction—extending far beyond the scope necessary to insure a fair trial or to protect the dignity or decorum of the Court—is a gross infringement on freedom of the press.

Preliminarily, we wish to stress the fairly obvious fact that restrictions on the gathering of news at the source are restrictions on freedom of the press. Such news gathering is as much an integral part of the functions of the press as is either publication or distribution. Without it, neither publication nor distribution could occur. As stated by Judge Musmanno in his dissent in *In re Mack*, 386 Pa. 251, 126 A. 2d 679, 689-690 (1956):

> "Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When any one of these integral operations is interdicted, freedom of the press becomes a river without water. Gathering of news embraces photographing of the news, printing of the photographs, and reproduction of the photographs in the finished newspaper. . . .
>
> "The action photo has become as much a part of the newspaper of today as the weather reports. To deny the newspaper reader pictures on the personalities and events of the day is to tear away one-half of his paper. Pictures have become wedded to the written word in the dissemination of information in every field of human endeavor."

The earlier decisions of this Court with respect to freedom of the press dealt primarily with the right to publish. See, for example, *Near* v. *Minnesota*, and *Grosjean* v. *American Press Co.*, *supra*. But this Court has repeatedly recognized that freedom of distribution is as essential to freedom

of the press as is the freedom to print or publish. Thus, in *Lovell* v. *City of Griffin*, 303 U. S. 444, 452 (1938) the Court said:

> "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation the publication would be of little value."

Many of the more recent decisions of this and other courts deal with the freedom of distribution or circulation—the third of the three major categories of press activity. E.g., *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952); *Staub* v. *Baxley*, 355 U. S. 313 (1958); *Smith* v. *People of California*, 361 U. S. 147 (1959); *Kingsley Int. Pic. Corp.* v. *Regents*, 360 U. S. 684 (1959).

Newsgathering obviously is the *sine qua non* of freedom of press. If there were a law or court order prohibiting a newspaper from gathering news at any source, freedom of the press would be stifled in the most effective manner possible. News cannot be published or circulated until it is gathered.

The essential part which newsgathering plays in freedom of the press has been recognized by this Court. In *Associated Press* v. *United States*, 326 U. S. 1 (1945) the Court noted that Associated Press is an agent of its member newspapers and that its "business is the collection, assembly and distribution of news." The importance of access to news was stressed by the Court in its conclusions that (326 U. S. at 13) "Inability to buy news from the largest news agency, or any one of its multitude of members, can have most serious effects on the publication of competitive newspapers" and that (326 U. S. at 20):

> "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and an-

> tagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society . . . The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."

Likewise, in *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 602-603 (1953) this Court stressed the value of newspapers in our system of government, and particularly the need for "news from any sources." The curtailment of sources of news therefore must be contrary to the purposes of the First Amendment.

It follows that the trial court erred in apparently concluding that freedom of the press relates only to "expression" or "circulation". Access of a newspaper to news at its source is an essential part of the constitutionally-protected freedom. Moreover, this freedom of access is a right of the *public*, not merely of the press, as it is necessary in order that the public may be informed as to facts and issues, the manner in which government is carried on, and the conduct of the public trials required by the Constitution.

Newspaper coverage has been recognized as essential to the "public" trials required by the Constitution. In *People* v. *Jelke*, 308 N. Y. 56, 123 N. E. 2d 769, 772, 48 A. L. R. 2d 1425 (1954), the court noted that publicity helps assure the accused of a fair trial, provides "contemporaneous review in the forum of public opinion", helps assure testimonial trustworthiness "by inducing the fear of exposure" of false testimony, and also brings "notice of the proceedings to the attention of possible witnesses who may not be known to the parties." The court stated (123 N. E. 2d at 774):

> "Due regard for defendant's right to a public trial demanded, at the very least—certainly, lacking valid legislative sanction—that he be not deprived of the possible benefits of attendance by the press . . . Its widespread reporting of what goes on in the courts

may well prove a potent force in restraining 'possible abuse of judicial power.'"

In *In re Oliver*, 333 U. S. 257 (1948), this Court discussed at considerable length the reasons for the constitutional requirement of a public trial, including the history of Star Chamber proceedings, *lettres de cachet* and the Inquisition. The Court quoted (333 U. S. at 271) the following statement from Bentham, Rationale of Judicial Evidence 524 (1827): "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance."

If normal present-day news coverage—consisting of pictures and interviews—is to be effectively foreclosed or curtailed, as Judge Pye has ruled, clearly the right to a "public" trial is impaired.

Judge Pye apparently took the position that any right the newspapers have to obtain news could be satisfied by photographing and interviewing individuals after they had left the "courthouse square." However, it must be noted that the court's rule prohibits photographs and recordings as to "any defendant, prosecutor, attorney, witness, juror, spectator, or other participant in or at any trial . . . until it shall have been completed and all persons in attendance thereon shall have retired from the courthouse and adjacent sidewalks and public streets, and thereafter shall have dispersed." Taken at face value, the rule imposes on the news photographer and reporter the nearly impossible task of locating newsworthy individuals after they have "dispersed".

The physical difficulty—if not impossibility—of tracing individuals after they have dispersed into the crowds on the sidewalks, leading in all directions from the courthouse square, and after they have taken taxicabs or other means

of transportation which mix them with the mass of traffic of a large, busy city, is obvious. The practical effect of the court's rule is to prohibit the taking of meaningful news photographs and the recording of meaningful interviews with respect to trials presided over by one of the judges of the Fulton Superior Court.

Even if it were possible to pose individuals for pictures after they had dispersed into the city throngs, the news value would be greatly reduced. A picture of a participant in a trial is newsworthy when taken with the courthouse in the background. It is far less newsworthy with a department store or newspaper office in the background.

This Court has shown its awareness of the importance of time and place in the newspaper field. In *Bridges* v. *California*, *supra*, the Court noted that contempt judgments for statements made during the pendency of a trial would "produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height."

Thus, by preventing the gathering of news in the vicinity of the courthouse, the trial court would substantially prohibit or greatly restrict the gathering of trial news, and would detract largely from the newsworthiness of any pictures and interviews which might be obtained. Such restrictions on the essential first step in the newspaper field—newsgathering—constitute a grave "prior restraint" on, and infringement of, freedom of the press.

2. *The Curtailment of Freedom of the Press Which Would Result From the Trial Court's Rule Is a "Previous Restraint" Which Is Plainly Unconstitutional.*

As the trial court's rule constitutes a clear abridgment of freedom of the press, the question remains whether the Constitution forbids such abridgment. In terms, the First Amendment prohibits *any* abridgment of freedom of speech or of the press. Restraints of the press in the form of taxation have been held unconstitutional. *Grosjean* v. *American*

Press Co., supra; Murdock v. *Pennsylvania*, 319 U. S. 105 (1943); *Jones* v. *Opelika*, 319 U. S. 103 (1943). But the Court has made it plain that there is no "limit" on the "protection of the right to any particular way of abridging it" (*Grosjean* v. *American Press Co.*, 297 U. S. at 249), and the Court quoted with approval the statement of Judge Cooley that the First Amendment prohibits "any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." The Court further stated in the *Grosjean* case (297 U. S. at 250):

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

This Court has particularly condemned any "previous restraint." In *Near* v. *Minnesota*, *supra*, the Court held unconstitutional a statute authorizing an injunction against any person engaged in the business of publishing defamatory materials. The Court pointed out (283 U. S. at 716) that "the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases." The Court said further (283 U. S. 716):

> "The exceptional nature of its limitations places in a strong light the general conception that liberty of the

> press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship."

In the *Burstyn* case, *supra*, the Court held censorship of movies to be an unconstitutional prior restraint, saying (343 U. S. at 503): ". . . previous restraint is a form of infringement upon freedom of expression to be especially condemned." Referring to the decision in the *Near* case, the Court said (343 U. S. at 503): ". . . a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection."

In *Superior Films* v. *Department of Education*, 346 U. S. 587 (1954) Justices Douglas and Black concurred, using the following language:

> "Certainly a system, still in force in some nations, which required a newspaper to submit to a board its news items, editorials, and cartoons before it published them could not be sustained . . . Any such scheme would be in irreconcilable conflict with the language and purpose of the First Amendment."

It should be noted that the *Burstyn* and *Superior Films* cases, as well as others which could be mentioned, specifically recognize that the taking and publication of pictures are encompassed in freedom of the press equally with the printed word.

In the *Kingsley* case, *supra*, this Court stated that censorship strikes "at the very heart of constitutionally protected liberty"—*i.e.*, "freedom to advocate ideas." The Court concluded that the remedy for publication of criminal ideas is punishment for crime, not abridgment of speech and press, at least where there is "nothing to indicate that the advocacy would be immediately acted on."

Other leading decisions on "prior restraints" are *Lovell* v. *Griffin*, *supra*; *Staub* v. *Baxley*, *supra*; *Jamison* v. *State of Texas*, 318 U. S. 413 (1943); and *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436 (1957).

In all the decisions this Court has made it clear that, in the absence of most extraordinary circumstances (a "clear and present danger") affecting the public, the First Amendment will not tolerate governmental action which *prevents* publication before it occurs. See also, *Dailey* v. *Superior Court*, 112 Cal. 94, 44 Pac. 458 (1896).

In more recent decisions, the Court has found unconstitutional various indirect and subtle restrictions on freedom of expression and the press. *Speiser* v. *Randall*, 357 U. S. 513 (1958)—tax exemption tending to influence individual expression; *Smith* v. *People of California*, *supra*—penalty against bookseller irrespective of *scienter*; *National Ass'n* v. *Alabama*, 357 U. S. 449 (1958) and *Bates* v. *Little Rock*, 361 U. S. 516 (1960)—exposure of membership lists; and *Talley* v. *State of California*, 362 U. S. 60 (1960)—requirement that author's name be printed on handbills. In the *Bates* case, the Court stated that "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interferences."

If there should be a suggestion that a *court* may do what other agencies of government may not, the answer is contained in *National Association* v. *Alabama*, *supra*, as follows (357 U. S. at 463):

> "It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize."

And in *Craig* v. *Harney*, 331 U. S. 367, 374 (1947), the Court said:

> "There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."

Judge Pye's rule is a very direct and effective "prior restraint", as it stops or at least greatly hinders freedom of the press at the very point where news publication must start—the source of the news. But even if it were regarded as an "indirect" or "subtle" restriction of the press, the foregoing authorities clearly establish that the rule is unconstitutional.

3. *There Is No "Clear and Present Danger" Which Would Justify the Curtailment of Freedom of Press Which Would Result From the Trial Court's Rule.*

The basic constitutional principle which prohibits the trial court's rule is that freedom of speech and the press may not be curtailed in the absence of a "clear and present danger" that the exercise of such freedom will bring about a "substantive evil" which an agency of government—here the trial court—"has a right to prevent." This principle was first announced in *Schenck* v. *United States*, 249 U. S. 47, 52 (1919), as follows (Holmes, *J.*, speaking for the Court):

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

This principle has been applied to newspaper articles as to which trial courts have sought to punish the publishers through contempt proceedings, in *Bridges* v. *California*, *supra*, *Pennekamp* v. *Florida*, 328 U. S. 331 (1946) and *Craig* v. *Harney*, *supra*.

The *Bridges* case involved several newspaper articles: (1) Editorials referring to union members convicted of assault and battery as "gorillas" and urging the trial court not to place them on probation, (2) Editorials praising verdicts in criminal cases before imposition of sentence and (3) Articles quoting a telegram from labor leader Harry Bridges threatening a strike affecting the entire Pacific Coast if a court decision which he called "outrageous" were enforced. The Supreme Court concluded that none of these publications constituted a "clear and present danger" to the fair administration of justice.

The Court enunciated the following definition of "clear and present danger" as applied to attempted restrictions on freedom of speech and the press (314 U. S. at 263):

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

The Court flatly rejected the suggestion that the established common-law power to punish out-of-court publications as contempt should be deemed to override the constitutional protection for freedom of the press, stating (314 U. S. at 264) that "to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on

liberty of speech and of the press.' Schofield, Freedom of the Press in the United States. 9 Publications Amer. Sociol. Soc., 67, 76." In the same connection, the Court quoted James Madison, "the leader in the preparation of the First Amendment", as saying that "the freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution," and that "the state of the press * * * under the common law, cannot * * * be the standard of its freedom in the United States."

The Court went on to conclude with respect to the purpose of the First Amendment as follows (314 U. S. at 265):

> "There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing. And since the same unequivocal language is used with respect to freedom of the press, it signifies a similar enlargement of that concept as well. Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."

The Court stated (314 U. S. at 268):

> "History affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case."

The Court brushed aside the suggestion that criticism of the courts would result in "disrespect for the judiciary", and then stated (314 U. S. at 271):

> "The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment."

From the foregoing, the following principles may be derived:

(1) Punishment for exercising freedom of the press may be imposed only if the "substantive evil" which might result from such exercise is "extremely serious" and its "degree of imminence" is "extremely high".

(2) The common-law restraints on the press in England have been substantially removed by the First Amendment which "does not speak equivocally" but is "intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society."

(3) "Out-of-court publications pertaining to a pending case" are entitled to the same constitutional protection as "other types of utterances", and this is true even in contempt proceedings.

(4) Courts do not have the unchallenged right to "close all channels of public expression to all matters which touch upon pending cases", but the right to punish such expression can be exercised only where "the particular utterances" and "the circumstances of their publication" justify such action in the light of the standards thus established by the Court.

Here, as in the *Bridges* case, there is no "extremely serious" evil with an "extremely high degree of imminence" which would justify imposing a "blackout" on newsgathering outside the Fulton County Courthouse. Defendants, counsel, witnesses and spectators are photographed and interviewed on the courthouse steps and adjoining sidewalks and streets in every large city in the Nation on every business day. It cannot be said that there is anything unusual about the Fulton County Courthouse which necessitates prohibitions there which are unnecessary elsewhere. The acts prohibited are not of a nature which would, under normal circumstances at least, interfere in any way with the administration of justice. A picture taken, or an interview recorded, on the courthouse steps or on the sidewalk could hardly disturb a trial being conducted inside the building and several floors above the street.

It is possible to conceive of mob scenes before the courthouse which would interfere with the court's work, but even in such cases it is difficult to see how photography and

interviews would be the cause of such scenes or would add materially to the confusion. Assuming, however, that there might be an occasion when photographing or interviewing near the courthouse would interfere with justice, an *ad hoc* rule or order of the court would appear to be the proper remedy—not a blanket order prohibiting thousands of innocent acts which could not obstruct justice in order to cover one act on one day which might affect the court's work.

It could not be maintained that the trial court has *greater* power to prohibit conduct *in advance* than it has to punish conduct *after* it occurs. The decisions of this Court referred to above teach the contrary—that "*previous* restraint is a form of infringement upon freedom of expression *to be especially condemned*" (italics added). *Joseph Burstyn, Inc.* v. *Wilson, supra,* 343 U. S. at 503.

This Court has repeatedly reversed contempt judgments arising from out-of-court publications dealing with the courts. *Nye* v. *United States,* 313 U. S. 33 (1941); *Bridges* v. *California, supra; Pennekamp* v. *Florida, supra;* and *Craig* v. *Harney, supra.* If subsequent punishment of *publication* is a violation of freedom of the press in the absence of a "clear and present danger" to the administration of justice, a "previous restraint" on the *gathering* of information necessary for printing and publication must be *a fortiori* an unconstitutional invasion of the rights of the press.

So far as we can determine, no court has ever held the taking of pictures or the recording of interviews outside the courthouse to constitute contempt of court. It is true that in *Tribune Review Pub. Co.* v. *Thomas,* 254 F. 2d 883, 885 (3d Cir. 1958) the court said that "If a judge may, for the purpose of maintaining order and decorum, control the taking of pictures in his own court room it can hardly be successfully argued that his power stops when one closes the court-room door." However, the conduct there under

discussion took place within 40 feet of the courtroom and violated a rule applicable only to the interior of the courthouse. Certainly the court was not suggesting that the court's power extended indefinitely beyond the courthouse, and it actually had no occasion to comment on facts other than those there presented. Likewise, in *Ex parte Starm*, 152 Md. 114, 136 Atl. 312 (1927), *In re Mack*, *supra*, and *Bramfield* v. *Florida*, 108 S. 2d 33 (Fla. 1958), the pictures were taken inside the courthouse.

In *Baltimore Radio Show* v. *State*, 193 Md. 300, 67 A. 2d 497 (1949), *cert. denied*, 338 U. S. 912 (1950), the court rule under consideration prohibited publication of any matter which would affect a fair trial or interfere "with the administration of justice." The parties there conceded that the rule could serve only as a "warning", but even with that construction of the rule the court said that there was "force" in the contention that the rule was unconstitutional as "censorship" or "previous restraint". In the *Baltimore Radio Show* case, the rule at least was directed to a substantive evil—interference with fair trial and administration of justice. Judge Pye's rule has no such specific direction. It prohibits *all* picture-taking and *all* recording of interviews near the courthouse whether or not they would interfere with justice and even though they might consist of such innocent acts as:

(1) a child's photographing its parents as they reach the sidewalk after attending court;

(2) the photographing of a famous person who attended a trial as a spectator; or

(3) the inferviewing of the governor on political matters after he attended a trial as spectator or witness.

As the Court said in the *Bridges* case (314 U. S. at 271):

"But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve

> judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases."

If the courts cannot "close all channels of public expression" by use of the contempt power, surely they may not do the same thing by the more drastic, and more universally condemned, method of "previous restraint" or "censorship".

This Court has repeatedly stated that there must be a clear and direct relationship between the *object* of governmental action impairing First Amendment freedoms and the *means* adopted by the government in seeking to achieve that object. *Watkins* v. *United States*, 354 U. S. 178 (1957); *Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957); and see to the same general effect *Winters* v. *People of New York*, 333 U. S. 507 (1948), where the Court stated that if a statute is "so vague and indefinite . . . as to permit . . . the punishment of incidents fairly within the protection of the guarantee of free speech" the statute is unconstitutional (333 U. S. at 509); and that "Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained" (333 U. S. at 520).

Thus, even if it could be assumed that, on occasion, the trial court could project its authority outside the courthouse to correct a known evil threatening the court's work, the rule here involved goes much too far as it is a *prior restraint* on acts which are "fairly within the protection of the guarantee of free speech" and press, and it makes "criminal an innocent act." Moreover, the prohibition is not only "entwined with limitations on free expression" (333 U. S. at 517), but its evident objective is to *prevent* full and free reporting of news relative to trials—and it goes even much further by prohibiting actions having no relationship to any trial.

Judge Pye's decision concerns itself at length with such questions as (1) the possibility of "trial by newspaper";

(2) possible exposure of the jury to extraneous influences; (3) possible "distraction" of witnesses; (4) the individual's right to remain silent; (5) the "right of privacy"; and (6) the public character of the streets, sidewalks and entrances outside the courthouse as limiting the right of newspapers to gather news there.

Except as a flagrant restriction on courthouse news coverage of any type—proper as well as improper—the rule has no relationship to the alleged evils to which it is directed. It does not prohibit *improper* news coverage—it prohibits *all* coverage dependent on access to persons at the courthouse who attended the trial. It does not prohibit extraneous pressures on the jury—it prohibits only photography and interviews in *some* areas where the jury may be, regardless of whether the jury would be affected thereby or not. (Part 4 of the rule—not challenged here—prohibits photographs and recorded interviews of jurors at *any* time or place.) It does not prevent distraction of witnesses—it prevents only *photography* and *recorded* interviews. It does not protect the individual's right to remain silent—it "protects" him from photography and interviews which he might welcome and could easily refuse if he so desired. It does not protect the right of privacy—it imposes a privacy which the individual may not desire and which he could obtain for himself and protect without aid of the court, if he so desired. Our system of laws protects "right of privacy" in other ways, and, except in most extraordinary circumstances, does not rely on censorial court orders.

Insofar as Judge Pye's decision is predicated on the public nature of the areas surrounding the courthouse, it totally misconceives the law respecting freedom of speech and the press. This Court has often held that *public* areas must be kept open for speech and distribution of literature. *Hague* v. *Committee for Ind'l Organization*, 307 U. S. 496 (1939); *Schneider* v. *New Jersey*, *supra*; *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Tucker* v. *Texas*, 326 U. S. 517 (1946); and cf. *Breard* v. *Alexandria*, 341 U. S. 622 (1951). Thus,

the public character of the area argues strongly for freedom of speech and press, not for restrictions.

Here there is no "clear and present danger" of interference with justice which could support *any* prohibition or restriction of photography or interviews outside the courthouse, much less the very broad and sweeping interdiction promulgated by Judge Pye. The door barring "intrusion" upon freedom of the press must be kept "tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." *Roth* v. *United States*, 354 U. S. 476 (1957). Judge Pye's rule is not the "slightest crack" in the door; it represents wholesale "intrusion" on freedom of speech and press by prohibiting *in advance* conduct which in the great majority of instances could not be wrong or harmful in any degree.

Any rule of court in this area must be limited to the prohibition of misconduct which clearly would interfere with the administration of justice and which is geographically near to the court—*i.e.*, conduct which would be punishable as contempt. *Nye* v. *United States*, *supra*. By prohibiting innocent conduct which could not interfere with justice, solely because of the possible but extremely rare situation in which similar conduct might be wrongful and obstructive of justice, the rule plainly violates the freedom of the press.

4. *Other Constitutional Rights Are Infringed by Judge Pye's Rule.*

The foregoing discussion deals primarily with freedom of speech and of the press—rights preserved and protected by the First Amendment to the Constitution. These rights are also protected as "fundamental personal rights and 'liberties'" by the due process clause of the Fourteenth Amendment. *Gitlow* v. *New York*, *supra*, 268 U. S. at 666, and see cases cited *supra* p. 12.

Judge Pye's rule likewise violates the privileges and immunities of citizens of the United States in that it re-

stricts the use of public streets and sidewalks for the communication of thoughts, information and ideas. *Hague* v. *Committee for Industrial Organization*, *supra*, 307 U. S. at 512-516.

Also, as demonstrated above (pp. 16-17), Judge Pye's rule deprives the public of its right, protected by the Fourteenth Amendment (*In re Oliver*, *supra*), to have criminal trials held in "public" and given full and proper publicity.

Finally, Judge Pye's order, being applicable only to cases presided over by Judge Pye and to persons going to and from Judge Pye's courtroom, denies appellants and the general public of the just and equal protection of the laws, creating an arbitrary and unreasonable classification without basis in fact or law. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Southern Ry.* v. *Greene*, 216 U. S. 400 (1910); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938).

CONCLUSION

The decision of the Supreme Court of Georgia erroneously deprives appellants of important rights guaranteed them by the Constitution of the United States. The questions presented by this appeal are substantial and of public importance and, for the reasons outlined above, are of such a nature as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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